No. 84-773

IN THE

Supreme Court of the United States

October Term, 1984

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ALEXANDER L. STEVAS,

MICHAEL BENDER, et al.,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE, THE RUTHERFORD INSTITUTE OF ALABAMA, THE RUTHERFORD INSTITUTE OF GEORGIA, THE RUTHERFORD INSTITUTE OF MINNESOTA, THE RUTHERFORD INSTITUTE OF MONTANA, THE RUTHERFORD INSTITUTE OF TENNESSEE, THE RUTHERFORD INSTITUTE OF TEXAS, AND THE RUTHERFORD INSTITUTE OF VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning individual free speech rights and the constitutional necessity of the state to recognize and accommodate religious pluralism and diversity in the operation of America's public

[1]Counsel of record to the parties in the case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

schools. The Rutherford Institute is greatly concerned about the implications for religious freedom and tolerance raised by the Court of Appeals' decision in this case.

The Rutherford Institute believes that the Court of Appeals erred when it upheld the Williamsport school board policy prohibiting students from meeting voluntarily during a self-directed student activity period solely because of the religious content of their speech. The activity period, which clearly did not advance religion, merely provided a time for students to meet freely for self-directed activity. It manifestly recognized in neutral fashion the freedom of each student to utilize the activity period in the manner he or she individually chose. Consequently, it did not infringe upon religious conscience or constitute state-sanctioned or endorsed religion.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Georgia, Minnesota, Montana, Tennessee, Texas and Virginia, and its national office in Manassas, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* have specialized in constitutional litigation in state and federal courts, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici curiae adopt by reference the statement of facts as set forth in Petitioners' brief filed with this Court. However, the following findings of the District Court should also be carefully considered by this Court in deciding this case:

> This is not a case where school administrators have adopted a rule or policy requiring, or even allowing, students to meet for religious purposes. This is not a case where a school teacher or other school official has adopted a practice of requiring or encouraging school prayer or other religious discussion in his classroom. It is not a case where a teacher or other school official encouraged or counselled the students to request the opportunity to meet during the activity period. It is not a case where the students represent a particular religious denomination. Rather, in this case, a number of students, acting voluntarily and free of outside influences, have requested permission to form a club and meet during the school's activity period on the same basis as other student organizations. The request was denied on the sole ground that the students wish to engage in religious speech. This decision was not based on a judgment regarding curricular choices or concerns of discipline and order. It was based solely upon the belief that the school board cannot exercise power to grant the request without contravening the United States Constitution.

Bender v. *Williamsport Area School District*, 563 F. Supp. 697, 698-699 (M.D. Pa. 1983).

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary

and founding periods was fundamentally religious and favored government accommodation of religious practices. Both Thomas Jefferson and James Madison, often cited for their disestablishmentarian views, in fact tolerated and approved numerous religious practices in the public schools and in public life. Jefferson, for example, was President of the School Board of the District of Columbia where the Bible and the Watts Hymnals were used as primary texts. Moreover, our national history is replete with examples of government, in a spirit of toleration and accommodation, recognizing America's religious tradition and culture, but without infringing on the rights of conscience of those who do not subscribe to particular tenets of that tradition or culture.

The principles announced by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) and *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969) should control the disposition of this case. The school district has created a "free" period for independent student activity. Having done so, it may not then discriminate against some students solely on account of the content of their speech. Once access for voluntary, self-directed free speech activity is accorded to some, it should be accorded to all. Moreover, there is no constitutionally valid reason why an "open forum" in a public high school should be treated differently than one in a public university. There is no implied state sponsorship of religious activity in an open forum policy, neither is there any state-mandated or endorsed religious exercise. Student meetings are wholly voluntary, without violation of conscience. Under these circumstances the school district cannot be said to lend its prestige, power or influence to religious thought or expression. Rather, it has affirmatively accommodated religion and non-religion, without favoritism or hostility. *Lynch v. Donnelly*, ____U.S.

____, 104 S. Ct. 1355 (1984). This approach properly advances the free speech rights of all students without imposing upon the rights of conscience of others.

ARGUMENT

I.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School Does Not Conflict With The Intentions Of The Framers Of The First Amendment As Revealed In Their Words, Deeds And History.

In Religion Clause adjudication, no less than any other area of law, Justice Oliver Wendell Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and *"as illuminated by history"* is of particular relevance here. *Lynch* v. *Donnelly*, ___U.S. ___ , ___ , 104 S. Ct. 1355, 1361 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). Because of this basic constitutional presupposition, concrete, specific historical evidence of the Framers' views on religion and religious practices in public education must be placed at a premium to understand the reach and meaning of the First Amendment Religion Clauses.

History provides varied and ample evidence that among the Founders of this Republic the universal sentiment towards religion was one of *accommodation*. Public education was no exception. For example, the Continental Congress enacted the Northwest Ordinance on July 13, 1787. That ordinance, in part, provided:

> *Religion*, morality, and knowledge being essential to good government and the happiness of mankind,

> *schools and the means of education* shall forever be encouraged.

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927) (emphasis supplied). This early acknowledgement of the relationship between religion and education bespeaks a clear intent that religion, instead of being segregated from the educational process, was, in fact, inseparable from the educational process. It is also significant that on August 7, 1789 (after the agreement to the final wording of the First Amendment Religion Clauses and the other provisions of the Bill of Rights), the Congress of the newly formed Federal government reenacted the Northwest Ordinance. *An Act to provide for the Government of the Territory Northwest of the river Ohio* (Northwest Ordinance), Ch. 8, 1 Stat. 50-51 (Peters ed. 1845). Any public school policy that fails to accommodate the diverse religious tradition of the American people is, therefore, at odds with the mandate for education found in the Northwest Ordinance.

The views of Thomas Jefferson and James Madison have been previously recognized by this Court as most instructive in determining the meaning and reach of the Religion Clauses. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). Although Thomas Jefferson can in no sense be regarded as a Framer of the First Amendment, this Court, in its early Religion Clause cases, has adopted the view that "the framers spoke in a wholly Jeffersonian dialect and those who ratified it fully understood that style of speech." M. Howe, *The Garden and the Wilderness* 10 (1965).[2] At the time of the drafting and adoption

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[2]Antieau, Downey and Roberts note, however, that: "[T]he First Amendment was hardly the exclusive product of any one person. Subsequent interpretations of the Amendment should not be controlled by the singular statements of Madison [or] Jefferson . . . . An

of the First Amendment, Jefferson was in France. However, through his correspondence with James Madison, his influence was at least partially felt.

In many ways, the views of Madison and Jefferson were *not* representative of those of the Framers of the Constitution. Both Madison and Jefferson were from Virginia and were central figures in the fight in that state for the disestablishment of the Church of England. *See Everson* v. *Board of Education*, 330 U.S. at 11-13 and 33-42 and *Engel* v. *Vitale*, 370 U.S. 421, 428-429 (1962).[3] Not all states, however, shared Madison's and Jefferson's fervor for disestablishment. As this Court has previously noted, at the outbreak of the Revolutionary War, "there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale*, 370 U.S. at 428.

Although the adoption of the Fourteenth Amendment eventually resulted in the Establishment Clause being made applicable against the States,[4] the historically di-

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examination of the early activities of the Federal Government indicates that the people approved and welcomed its aid to church related activities . . . . There was undoubtedly the faith that subsequent generations of Americans would be able to utilize the power of the Federal Government to promote the concurrent interests of government and religion under First Amendment norms that were reasonable, pragmatic, and just." C. Antieau, A. Downey and E. Roberts, *Freedom From Federal Establishment* 207-209 (1964).

[3]Both Madison's *Memorial and Remonstrance Against Religious Assessments*, written in 1785 in opposition to legislation which would use Virginia's public funds to pay teachers of the Christian religion, and Jefferson's *Bill for Establishing Religious Freedom* in Virginia, proposed in 1779 and enacted in 1786 were central documents to these disestablishmentarian forces.

[4]Historical evidence of the Framers' intent is made no less relevant by the adoption of the Fourteenth Amendment. In *Marsh* v. *Chambers*, 463 U.S. 783, ___ , 103 S. Ct. 3330, 3335, (1983) this Court said:

> In applying the First Amendment to the states through the 14th Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), it

verse record of state church establishment nevertheless illustrates that the term "establishment" in the First Amendment had an *institutional* meaning: "[t]he real object of the [first] amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." *Lynch v. Donnelly*, ___U.S. at ___ , 104 S. Ct. at 1361, *citing* 2 J. Story, *Commentaries on the Constitution of the United States* 593-595 (2d ed., 1851). As Jefferson's often quoted expression stated, the Religion Clauses were to build "a wall of separation between *Church* and *State*." 8 *Works of Thomas Jefferson* 113 (Washington ed. 1861) (emphasis supplied). No wall of separation was intended, however, even by Jefferson, to seal religion hermetically from governmental or public activities. Rather, the *institution* of the church was to be isolated from the *institution* of the state. As Jefferson stated in 1817:

> If by *religion*, we are to understand *sectarian dogmas*, in which no two of them agree, then your exclamation on that hypothesis is just, "that this would be the best of all possible worlds, if there were no religion in it." But if the moral precepts, innate in man, and made a part of his physical constitution, as necessary for a social being . . . in which all agree, constitute true religion, then, without it, this would be, as you again say, "something not fit to be named even, indeed, a Hell."

15 *The Writings of Thomas Jefferson* 109 (Memorial Ed. 1904). Indeed, it must be noted: "Probably, at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general if not the

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would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsman imposed upon the Federal Government.

universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship." J. Story, *supra; see also* H. Black, *Constitutional Law* 515 (4th ed., 1927) and T. Cooley, *Principles of Constitutional Law* 224 (1893). The First Amendment was, therefore, imbued by the Framers with amicability, not hostility, to the free exercise of religion. This was the *shibboleth* of that era.

That this sort of accommodation of religious freedom was compatible with the alleged "separationist" views of Thomas Jefferson was particularly evident in Jefferson's actions in the field of education. Jefferson as President repeatedly departed from the fastidious separationism which revisionist historians have attributed to him. For example, on three separate occasions, Jefferson signed into law extensions of a land grant given by the Federal government specifically to promote education and proselytizing amongst the Indians. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 41-46 (1982).[5] Further, In 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians in which the Federal government would agree to "give annually for seven years one hundred dollars towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of*

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[5]*An act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes*, as extended by: *An Act in addition to an act, intitled etc.*, Ch. 30, 2 Stat. 155-156 (Peters ed. 1845); *An Act to revive and continue in force, etc., and for other purposes*, Ch. 30, 2 Stat. 236-237 (Peters ed. 1845); and *An Act granting further time for locating military land warrants, and for other purposes*, Ch. 26, 2 Stat. 271-272 (Peters ed. 1845).

Indians, 7 Stat. 78-79 (Peters ed. 1846). The treaty was ratified on December 23, 1803, and included a specific appropriation for a Catholic mission, *at President Jefferson's request.*

Jefferson's involvement in the *accommodation* of the religious nature of the American people was not limited to Federal grants for the education and proselytizing of Indians. *It extended as well to general public education.*

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school was governed, managed and controlled by the Commonwealth of Virginia. The question of the constitutional limitations with respect to the teaching of the Christian religion at the University of Virginia was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in general institution of the useful sciences. . . . *A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science.* . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of

> personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and great advantage of *enabling the students of the University to attend religious exercise with the professor of their particular sect, whether in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . .

19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed., 1904) (Emphasis supplied). Simply put, Thomas Jefferson was not opposed to religious worship and study being conducted on the premises of a public educational institution. To the contrary, in order to perpetuate and accommodate the religious beliefs and exercise of students at the public University of Virginia, he recommended that students be allowed to meet on the campus to pray, worship and be instructed together or, if need be, to meet and pray with their professors. He wanted only to "exclude the public authorities from the domain of religious freedom," i.e. from prescribing religious expression. Surely, Jefferson would not have objected to voluntary, self-directed prayer, worship or instruction by students on the premises of a public school.[6]

It is also significant that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J.O. Wilson, *Public Schools of Washington,* 1 Records

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[6]James Madison was a Member of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools.

of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id.* at 5. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9.

If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, it will vigorously protect the Petitioners' freedom to associate voluntarily in public secondary schools for self-directed religious activity. To rule otherwise would distort the law and run contrary to the wishes of the very men who drafted the document upon which we base our freedoms.

II.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School Is An Example Of Affirmatively Mandated Accomodation.

First Amendment neutrality *mandates* that the public school present no affront to the spiritual needs and concerns of its students. Denying the rights of the student in the present case would have two "chilling effects" on the First Amendment rights of students. First, it would prefer those who believe in no religion over those who believe. Second, it would subjugate the Free Exercise Clause to Establishment Clause interests,[7] thus contradicting the original intention of the Framers of the First Amendment.

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[7]As Paul Kauper has written: "If the protection afforded in the name of religious freedom against a state-prescribed, non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause."

It is obvious that governmental actions which are "simply a tolerable acknowledgement of beliefs widely held among the people of this country," are not *per se* an establishment of religion. *Marsh* v. *Chambers*, 463 U.S. at ___ , 103 S. Ct. at 3336. It is equally clear that the "limits of permissible state accommodation are by no means co-extensive with the non-interference mandate by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. *See Sherbert* v. *Verner*, 374 U.S. 398, 423 (1963) (Harlan, J. dissenting); *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961)." *Walz* v. *Tax Commission*, 397 U.S. at 673. "There is room for play in the joints productive of benevolent neutrality" towards religion. *Id.* at 669. This benevolence is mandated in the present case.

Professor Alfred North Whitehead has pointed out that education is an essentially religious inquiry. A. N. Whitehead, *The Aims of Education* 26 (1952). Education, as contrasted with vocational training, requires an examination and discussion of fundamental values. Government schools obviously intrude into the area of religion with courses in comparative religion, philosophy, ethics, sex education and values clarification. As Professor Giannella notes:

> Unlike . . . other areas, formal public education does not involve a pattern of regulation in which the place of religion can be derived from secular categories . . . education directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II*, 81 Harv. L. Rev. 513, 561 (1968).

Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1030, 1063 (1962).

Because of this entrance of the state into the precinct of religion, it is constitutionally impermissible for government fanatically to seal religious expression from the public schools. Such a secularization would prefer nonbelief over belief. *Zorach* v. *Clauson*, 343 U.S. at 314. Moreover, the Constitution does not require "complete separation of church and state; it *affirmatively mandates accommodation*, not merely toleration, of all religions, and forbids hostility towards any." *Lynch* v. *Donnelly*, ___U.S. at ___ , 104 S. Ct. at 1359 (emphasis supplied).

The requirement of affirmatively mandated accommodation is particularly relevant in education. Just as state-prescribed religious exercises could convey—indeed inculcate—doctrines contrary to the views of the children's parents, here the placing of the governmental hand upon the shoulder of a young religious adherent for freely holding and expressing religious views would be equally inappropriate. In the past, this Court has sought to "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma". *Zorach v. Clauson*, 343 U.S. at 313-314. No more than that would be undertaken here in permitting equal access for self-directed religious activity on the same basis as other student activities.

III.

Permitting A Student Religious Organization To Meet Voluntarily In A Public High School On The Same Basis As Other Student Activities Does Not Violate The Establishment Clause.

The law of the case at bar should be drawn from this Court's precedents in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) and *Tinker v. Des Moines Independent School District* 393 U.S. 503 (1969). Both the Court of Appeals

majority and Judge Arlin M. Adams, in dissent, recognized the strong similarities between this case and *Widmar*. *See Williamsport Area School District* v. *Bender*, 741 F. 2d 538, 547 and 562. The majority stated:

> *Widmar*, of course, bears many similarities to the present case, at least insofar as the students' free speech rights are concerned. In both situations, there exists a policy of open access to state-owned facilities in an educational setting, a policy which certainly implies the existence of some type of forum. Indeed it is the very nature and purpose of any school, be it college or high school, to communicate knowledge. The fact that *Widmar* involved a *university*, while we here are concerned with a *high school*, does not mean we are free to ignore the nature of the free speech rights enjoyed by the students.

741 F. 2d at 547 (citations omitted). Thus, the only real difference between this case and *Widmar* is the setting, a public high school rather than a university. The issue for decision is whether and to what extent the First Amendment rights of secondary school students are less protected than those of university students.

A. First Amendment Rights In A Public High School May Be Restricted Only By Disciplinary Requirements, Certain Well-Defined State Constitutional Obligations and Reasonable Time, Place and Manner Regulations.

This Court has stated that First Amendment rights must be analyzed "in light of the special characteristics of the school environment." *Widmar* v. *Vincent*, 454 U.S. at 267-268, n. 5, *citing Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969). The Court has called for "care and restraint" in judicial interposition in the operation of the public school system. *Epperson v. Arkansas*, 393 U.S. 97, 164 (1968); *Board of Education*,

Island Trees v. *Pico*, 457 U.S. 853, 864, 866 (1982); *New Jersey, Petitioner v. T.L.O.*, ___U.S. ___ , 53 U.S.L.W. 4083, 4088, n. 9 (January 15, 1985). Deference to the judgment of school officials has been the rule. *Id.* However, when important constitutional safeguards are threatened, the Court has also declared that "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). Lack of vigilance would, as this Court has stated, "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943), and further, "cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

It is axiomatic that students "do not shed their rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 506; *West Virginia* v. *Barnette*, 319 U.S. 624 (1943). To limit or restrict such rights, the state must (1) demonstrate a compelling interest in maintaining discipline and standards of conduct conducive to learning in the public schools, *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 513, or in complying with the state's own constitutional obligations *Widmar* v. *Vincent* 454 U.S. at 271, or (2) promulgate reasonable time, place and manner regulations governing the speech in question. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Widmar* v. *Vincent*, 454 U.S. at 271. Further, any such limitation or restriction must be "narrowly drawn to achieve that end." *Id., citing Carey* v. *Brown*, 447 U.S. 455, 461, 464-465 (1980). The sole interest advanced by Respondents in this case is that the Establishment Clause precludes the school board from permitting Petitioners to meet on the same basis as other

student organizations simply because Petitioners wish to engage in religious association and speech. *See Bender* v. *Williamsport Area School District*, 563 F. Supp. 697, 699 (M.D. Pa. 1983).

B. The Court Of Appeals Has Failed to Distinguish The Law of This Case From The Important First Amendment Principles Set Forth In *Widmar* v. *Vincent*.

In the *Widmar* case, this Court found no Establishment Clause infirmity in an "open forum" policy at a public university, using the tri-partite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1970). In this case, however, two judges of the Court of Appeals ruled that the primary effect of an open forum in a high school environment would impermissibly advance religion and engender excessive entanglement with religion. The Court of Appeals majority distinguished this Court's "primary effect" analysis in *Widmar*, finding what it termed "heightened dangers" in a high school environment, namely:

> (1) High school students stand in a very different position than university students in terms of maturity and impressionability, in part, because the State in the high school environment "stand[s] in large measure, *in loco parentis*."
>
> (2) Religious meetings in high school present a "more obvious presence" because of compulsory attendance laws and the more structured and controlled environment, resulting in involuntary contact between nonparticipating students and religious groups.
>
> (3) The presence of a monitor, whether teacher, parent or other adult, imparts the impression of the state's approval of the student religious meetings.

741 F. 2d at 552-553. The majority was also influenced by the distinction it perceived between the use of public

classrooms and the use of off-campus locations for religious activities, citing *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) and Zorach v. *Clauson*, 343 U.S. 306 (1952). It viewed this distinction as an obvious and constitutionally significant "bright line" that would enjoin the proposed student religious activity. For the reasons expressed below, the majority is wrong on all counts.

First, in the absence of a direct, state-prescribed or initiated religious practice, constitutional doctrine should not depend upon judicial perceptions of the "maturity" or "impressionability" of secondary school students. Judge Adams was correct to warn of the dangers inherent in "vague impressions of the emotional sophistication of high school students." 741 F. 2d at 563. Judgments of this latter sort "should be made by academicians, not by federal judges." *Widmar* v. *Vincent*, 454 U.S. at 278-279 (Stevens, J. concurring). Williamsport school officials have determined that Williamsport students are sufficiently mature and independent for voluntary, self-directed activities in furtherance of "intellectual, physical or social development." There being a forum for such activities, the state may not then discriminate against students who decide to utilize state-granted freedom for activities with religious overtones. *Perry Education Association* v. *Perry Local Educator's Association*, 460 U.S. 37, 45-46 (1983). As this Court clearly stated in *Tinker*, ". . . students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." 393 U.S. at 511.

The majority suggested that the school district stands *in loco parentis* to high school students, somehow furthering the "impression" that the district endorses *all* activities that take place on its premises. *See* 741 F. 2d at 554. The *in loco parentis* concept was squarely rejected, however, in *New Jersey, Petitioner* v. *T.L.O.*, ____U.S.

____ , 53 U.S.L.W. at 4086, where the Court acknowledged "[t]his reasoning is in tension with contemporary reality and the teachings of this Court." *Accord, Wisconsin* v. *Yoder*, 406 U.S. 205, 229-234 (1972). As Judge Adams commented, "it is inconsistent to accept, on the one hand, a level of intellectual sophistication among high school students sufficient to consider and contribute to the exchange of controversial views and yet, on the other hand, to declare them incapable of discerning the distinction between a school's creation of a public forum that may permit religious speech and an endorsement of such activity." 741 F. 2nd at 564-565. Moreover, it is equally facile to conclude that compulsory attendance laws "compel" or unduly influence students to participate in voluntary, student-directed religious activities. The activities held during the free period were diverse and numerous. Participation was wholly voluntary. There was no compulsion to participate, nor was there any untoward influence. If anything, the very policy the majority advocates, that of excluding religious groups, "may in fact be understood as a manifestation of official hostility toward religion," clearly proscribed by the First Amendment. 741 F. 2d at 565 (Adams, J. dissenting); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1970); *Lynch* v. *Donnelly* ____U.S. ____ , ____ , 104 S. Ct. 1355, 1366 (1984) (O'Connor, J. concurring). "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel* v. *Paty*, 433 U.S. 618, 641 (1978) (Brennan, J. concurring).

The majority also contended that there would be a more "obvious" presence of religious groups on a high

school campus, thereby increasing the likelihood of "involuntary contact" by nonparticipating students. This Court has previously indicated in *Tinker* that First Amendment rights should not be permitted to depend upon "undifferentiated fear or apprehension of disturbance." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 508. In *Tinker*, this Court acknowledged that:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. *But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.*

Id. at 509 (citation omitted; emphasis added). Indeed, the purpose of school is to train and develop youth for citizenship and individual fulfillment "in the pluralistic, often contentious society in which they will soon be adult members". *Board of Education, Island Trees* v. *Pico*, 457 U.S. 853, 868 (1982); *Ambach* v. *Norwick*, 441 U.S. 68, 76-77 (1979). The school room is a "market place of ideas." *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 512. This is the goal of the pluralism we profess. The State's accommodation of all creeds, while espousing none, cannot help but to further intellectual and social development, as well as the values of pluralism, religious tolerance and religious liberty. To hold otherwise in the context of this case would "impose a crabbed reading of the [religion] clauses on the country," *Lynch* v. *Donnelly*, ____U.S. at ____ , 104 S. Ct. at

1366, stifling the diverse traditions and dynamics that have made this country great. As Judge Adams so eloquently stated in dissent:

> One of the great triumphs of America's constitutional experiment has been the avoidance of religious factionalism in the political sphere. Our country's continued progress in this endeavor ultimately depends on the individual citizen's tolerance and respect for religious diversity. When the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, I believe the Constitution and the Nation are the better for it.

741 F. 2d at 569-570.

The majority's objection to the presence of a neutral "monitor" at student activities is based solely on speculation. However, the only purpose of a monitor is to "insure orderly meetings," *Bender* v. *Williamsport Area School District*, 563 F. Supp. at 715, not to participate in such meetings. A monitor (whether teacher, administrator or otherwise) is, as the District Court recognized, no more than "the functional equivalent of a policeman at a religious rally held in a public park." *Id.* There is nothing in the record at trial that would suggest otherwise. The clearly defined role of the monitor in this case manifestly avoids the appearance of state endorsement of the activity in question.

In the absence of direct state prescription of religious instruction or exercises, it is clear that an "open forum" or "equal access" policy in public secondary schools would not violate Establishment Clause principles. *See Widmar* v. *Vincent*, 454 U.S. 263 (1981). There is no state sponsorship. No particular religious exercise is sanctioned by the schools. No student is required to practice a religious exercise or to attend religious instruction.

Student meetings are wholly voluntary and without violation of conscience in any respect.

Moreover, an "open forum" or "equal access" policy is unquestionably neutral. There is no favoritism. There is no "religious gerrymander." The state is not lending its prestige, power or influence to religious thought or expression. There is absolute neutrality between religion and religion, and religion and non-religion. As in *Widmar*, there is a proper balance between Establishment, Free Speech and Free Exercise. To decide otherwise would "ignore the fundamental differences between self-initiated and state-sponsored religious activity," 741 F. 2d at 538 (Adams, J. dissenting), and denigrate the First Amendment rights of students who choose to use the free period for religious speech.[8]

C. The Court of Appeals Has Overstated And Oversimplified The Significance Of The Distinction Between The *McCollum* And Zorach Cases.

Not only has the Court of Appeals majority failed to establish any persuasive basis on which to distinguish the *Widmar* case, it has also overstated and oversimplified the significance of any distinction between this

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[8]The Court of Appeals majority also concluded, as a matter of law and fact, that the Establishment Clause provides a compelling state interest which would override any free speech rights in this case. In making this finding, the Court of Appeals concluded, in part, that:

> Public schools have never been a forum for religious expression. The free speech right enjoyed by the students is therefore of a dramatically different character than the right to communicate in a traditional public forum such as a park or on a sidewalk, or through the press, where the overriding importance of allowing free expression has been deeply and firmly rooted throughout our history.

741 F. 2d at 560. This gross generalization should not be permitted to charade as constitutional law or fact. The historical record is abundantly clear that the public schools have *always* been a forum for religious expression of one form or another. *See* the historical

Court's decisions in *McCollum v. Board of Education*, 333 U.S. 203 (1948) and *Zorach v. Clauson*, 343 U.S. 306 (1952).

Zorach permitted "released time" religious instruction off-campus, whereas *McCollum* forbade similar activities on-campus. Unlike the present case, neither of those cases involved a state-created "open forum". The infringement upon individual First Amendment rights is far more onerous in the present case. Moreover, to conclude that the *geography* of the activity is the operative distinction between the cases is simplistic to the extreme and not supported by the case law. In *McCollum*, as well as in the later cases of *Engel* v. *Vitale*, *Abington School District* v. *Schempp* and *Stone* v. *Graham*,[9] the state clearly stood behind the content of the doctrinal teaching or exercise. In each, the government was actively *sponsoring* religion or *prescribing* religious exercises or practices on its premises as an integral part of the school curriculum. By contrast, in *Zorach*, the activities were not curricular in nature. They were not mandated or re-

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discussion in Part I of this Brief; *cf. Widmar v. Vincent*, 454 U.S. 263 (1981); *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The Court of Appeals also failed to address adequately the requirement of *Widmar* that state action restricting free speech be "narrowly drawn to achieve [the desired] end." 454 U.S. at 271. In this case, the school district denied *all* access to school premises for religious activities, stating that "present law simply does not permit public schools to authorize or support religious activities on school property." See Appendix A to Petitioners' Petition for A Writ of Certiorari at 6a. Such a blanket prohibition of religious meetings on school premises is constitutionally overbroad.

[9]In *Engel*, 370 U.S. 421 (1962), the Court ruled unconstitutional a state-prescribed nondenominational prayer for public schools. In *Schempp*, 374 U.S. 203 (1963), the Court forbade state-prescribed Bible readings in public schools. In *Stone*, 449 U.S. 39 (1980), the Court outlawed the state-prescribed posting of the Ten Commandments in Kentucky school rooms.

quired by the state, but were rather voluntary. Each student was "left to his own desires as to the manner or time of his religious devotions, if any." 342 U.S. at 311. The force of the school system was not used to advance the religious instruction involved.

The fallacy of any geographical distinction was plainly exposed by Justice Brennan in his concurring opinion in *Schempp*. He explained that the real issue in *McCollum* was placing the religious instructor in the same position of authority as the secular teacher in the public school classroom, "lending to the support of sectarian instruction all the authority of the governmentally operated public school system." 374 U.S. at 263. He continued:

> To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

374 U.S. at 263. This Court further distinguished *McCollum* in the *Widmar* case, noting that the school in *McCollum* appeared to sponsor the views of the speaker because school facilities were made available exclusively to religious instructors, but not to others. 454 U.S. at 271 n. 10. This is not the case here.

D. THERE IS NO ENTANGLEMENT PROBLEM PRESENTED HERE.

The entanglement prong of the *Lemon* "test" is not violated in this case. This Court has identified greater entanglement dangers in attempts to enforce exclusion of religious speech from a public forum. *Widmar* v. *Vincent*, 454 U.S. at 272, n. 11. The agreement by the religious group in this case to forego use of the school bulletin boards, public address system, newspaper and

yearbook presents a clear-cut policy capable of administration without entanglement. Any "entanglement" arising from the presence of a "monitor" would be wholly speculative and, in any event, as the District Court pointed out, very limited. 563 F. Supp. at 715. "There is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or 'enduring entanglement' present in *Lemon*." *Lynch* v. *Donnelly*, ____ U.S. ____, ____, 104 S. Ct. 1355, 1364 (1984) (citation omitted). Neither is there the type of direct subsidy which merits inquiry into potential political divisiveness. *Id.*, *citing Mueller* v. *Allen* 463 U.S. 388, ____, n. 11, 103 S. Ct. 3062, 3071, n. 11 (1983). In short, there is no constitutionally significant entanglement problem presented by this case.

CONCLUSION

If the school district had chosen to accommodate the free speech and religious interests of the Williamsport students, it would not have had a religious purpose for doing so, but rather the purpose of maintaining good relations with its students (while ensuring their constitutional rights), the purpose of acknowledging our Nation's diverse religious culture, or the purpose of accommodating the First Amendment rights of *all* students without discrimination. And if the district had chosen to accommodate those interests, it would not have advanced religion, but rather *passively* acknowledged (as opposed to actively prescribed) religious practices or exercises. *Walz* v. *Tax Commission*, 397 U.S. at 668.

It would not be enough, however, for the decision in this case to merely point out these obvious truths. For decades and even to this day, notwithstanding *Widmar*, American educators and students have labored under the dark shadow of the layman's belief that the United States

Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Justice Tom Clark, the author of the opinion in *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that a *required* prayer in the public school violates the Establishment Clause" (published official transcript of Justice Clark's address on November 5, 1964, as the featured speaker of a symposium on "*Religion and Public Schools*" at Wartburg College, Waverly, Iowa (November 5, 1964), at 46).

Unfortunately, the school district has specifically singled out the students in the student group known as "Petros" and has denied them their constitutional rights. In the process, students in this group have been denigrated and relegated to the position of second class citizens in a school system which is required by law to treat them neutrally, not with hostility.

It is urged that this Court put to rest in the strongest possible terms the insidious and simplistic idea that *any* religious expression in the public schools is automatically suspect. It is further urged that many fundamental constitutional rights are being violated under this misapplication of the Establishment Clause, cheapening the value of the constitutional rights of these students for no higher reward than to keep empty an empty school room (not "classroom").

The decision of the Court of Appeals conflicts with the First and Fourteenth Amendments to the United States Constitution as well as recent decisions rendered by this Court. The issue is one of such magnitude and of such

great constitutional importance that it should be decided by this Court in favor of the students' free expression.

Respectfully submitted,

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